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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TAYLOR JUNIOR CARTER,

Defendant and Appellant.

B231589

(Los Angeles County
Super. Ct. No. BA365737)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Affirmed.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Colleen M. Tiedemann and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Taylor Junior Carter appeals his conviction for one count of sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) and one count of possession for sale of a controlled substance (Health & Saf. Code, § 11351). Defendant contends that (1) the trial court abused its discretion in failing to strike his strike priors and sentence him to less than 25 years to life for the sale of 10 pills of Vicodin, and (2) his due process rights were violated because he was not advised his presumptive second strike case was going to be elevated to a 25-years-to-life case after he elected to go to trial. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant was charged in a two-count information filed May 14, 2010 with one count of offering to sell a controlled substance, hydrocodone, in violation of Health and Safety Code section 11352, subdivision (a) and one count of possession for sale of a controlled substance, hydrocodone, in violation of Health and Safety Code section 11351, arising out of the December 11, 2009 sale of 10 Vicodin tablets for which defendant had a valid prescription to an undercover officer. The information charged defendant had a prior conviction within the meaning of Health and Safety Code section 11370.2, subdivision (a), and further alleged that defendant had five prior strike convictions within the meaning of Penal Code sections 1170.12,¹ subdivisions (a) through (d), and 667, subdivisions (b) through (i).²

1. Prosecution Case

On December 11, 2009, at about 6:50 p.m., defendant was in front of the Rite Aid Pharmacy at Fifth and Broadway in Los Angeles. Los Angeles Police Department

¹ All statutory references herein are to the Penal Code unless otherwise indicated.

² Defendant's five strike priors, as more fully discussed *infra*, consisted of one count of rape by force or fear (§ 261, subd. (a)(2)), two counts of oral copulation (§ 288a, subd. (c)), and two counts of penetration with a foreign object (§ 289, subd. (a)), arising out of a single case with a conviction date of August 6, 1996. The information further alleges that one of defendant's section 288a subdivision (c) convictions resulted in a prior prison term within the meaning of section 667.5, subdivision (b).

Officers Mynerva Gramillo and Arthur Gamboa were on undercover narcotics detail. Officer Gramillo walked passed defendant and heard defendant say, ““pills.”” Defendant asked Officer Gamboa, ““do you need pills,”” and Officer Gamboa said “yes.” Officer Gamboa began to discuss the price of pills with defendant, and Officer Gamboa and defendant agreed upon a price of \$30 for 10 Vicodin pills. Officer Gamboa and defendant exchanged a packet of pills for which Officer Gamboa paid \$30 in “buy money.”³ Defendant had a large orange pill container in his hand that contained 63 additional Vicodin (hydrocodone) tablets.⁴ After the transaction was completed, defendant placed the money in his pants pocket.

Police use one-way transmitters to transmit conversations to other officers, but the transmitters do not record the conversation. Officer Charles Baley remotely monitored a wire during the transaction, and heard someone offer Officer Gamboa “10 Vicodins for \$30,” to which Officer Gamboa responded, ““okay.”” Two other officers working in tandem with Officers Gramillo and Gamboa placed defendant under arrest. On defendant’s person, police found both of the prerecorded “buy money” bills (a \$20 bill and a \$10 bill), the orange pill container with 63 pills, and additional currency.

In Officer Gamboa’s opinion, defendant possessed the Vicodin tablets for sale because the area is known for its sale of pills; defendant sold him some of the pills defendant had in his possession; and defendant had in his possession bills of small denominations consistent with the sale of pills. Further, the transaction was conducted in a fashion similar to numerous other undercover drug buys Officer Gamboa had made.

On December 10, 2009, defendant’s doctor, Catherine Chien, M.D., prescribed Vicodin for defendant to treat chronic lower back pain caused by degenerative disk

³ “Buy money” is money that police use to purchase drugs. To identify money used in a drug transaction, police write down the serial numbers of money they use to purchase illicit substances.

⁴ The generic component of Vicodin is hydrocodone.

disease. Defendant had metallic fragments in his lower back that resulted from a gunshot wound. Dr. Chien prescribed five tablets a day for a 30-day total of 150 tablets.

2. *Defense Case*

Defendant testified on his own behalf that he received \$954 per month in Social Security income. He has had severe back pain since 1978. Dr. Chien prescribed him Vicodin for the pain, and he took five pills per day. He denied selling the Vicodin on a regular basis. Defendant received his prescription in two bottles, one with 120 pills and one with 30 pills. He split the prescription between the two bottles into two 75-pill allotments so he could carry one bottle at a time.

On the evening of December 11, 2009, defendant was walking his dog at the corner of Fifth and Broadway. The area was very crowded. Defendant intended to go to the 7-Eleven across the street and get a drink so he could take a pill. Officer Gamboa came up to defendant and said, “nice dog,” and spoke to defendant about his dog. Officer Gamboa said, “what are those,” referring to defendant’s pills. Defendant answered, “Vicodin,” and Officer Gamboa responded, “would you sell me some?” Defendant said, “this is my medication,” and Officer Gamboa said, “I’ll give you \$30 for 10.” Defendant reiterated, “this is my medication,” but Officer Gamboa said, “my back is killing me, man, come on . . . just 10. I got \$30 right here.” A minute after defendant sold Officer Gamboa the Vicodin, he was arrested.

Defendant denied he was standing on the corner asking people if they needed pills, and asserted that the sale to Officer Gamboa was the only time he sold his Vicodin.

The jury found defendant guilty of both counts. A jury trial on defendant’s prior convictions found all true. After the trial court denied defendant’s motion to strike his prior strike convictions pursuant to *Romero v. Superior Court* (1996) 13 Cal.4th 497 (*Romero*), the court sentenced defendant to a total term of 25 years to life on count one, and pursuant to section 654 stayed his sentence of 25 years to life on count two. The court struck the prior prison term enhancement and the Health and Safety Code section 11370.2 enhancement.

DISCUSSION

I. REFUSAL TO STRIKE PRIOR STRIKE PRIORS

Defendant argues the trial court abused its discretion in failing to strike his prior strike convictions because the possession and sale of 10 pills of Vicodin falls outside the spirit of the “Three Strikes” law. In so arguing, defendant distinguishes *People v. Strong* (2001) 87 Cal.App.4th 328 (*Strong*) and *People v. Gaston* (1999) 74 Cal.App.4th 310 (*Gaston*) on which the trial court relied, and argues the relevant factors support striking the priors and sentencing him as a second strike offender. He further argues the resulting sentence of 25 years to life violates the Eighth and Fourteenth Amendment and is cruel and unusual punishment because the sentence is grossly disproportionate to the crime committed and, because defendant was 62 years old at the time of sentencing, sentences him to a virtual life sentence.

A. Factual Background

The prosecution’s sentencing memorandum recommended that defendant be sentenced to 25 years to life under the Three Strikes law based upon his prior criminal history, including the five prior strikes alleged, plus three years’ formal probation for a Health and Safety Code section 11350, subdivision (a) violation in 1987, and a two-year prison sentence for a Health and Safety Code section 11351 violation in 1988.

Further, defendant had an extensive criminal history dating back to 1964, when he was arrested for larceny in Virginia and received 12 months of probation. In 1965, while in custody, defendant received a 12-month sentence for assaulting a guard; in 1968, 1971, and 1975, defendant was convicted of charges of burglary and larceny, receiving a sentence of eight years for the 1975 conviction. In 1979, defendant was fined for a conviction of petty larceny; the same year, he was arrested for possession of a controlled substance and credit card fraud. After moving to California in 1979, defendant was convicted of misdemeanor possession of a syringe; in 1980, he received 12 months of probation for a petty theft conviction; in 1985, he received 24 months of probation for possession of a syringe; in 1987, he was convicted of a Health and Safety Code section

11350, subdivision (a) violation and received three years formal probation and 239 days in jail. In 1988, defendant was convicted of a Health and Safety Code section 11351 violation, and was sentenced to two years in prison concurrent with his sentence for his 1987 conviction. In 1989, defendant was in violation of his parole for violations of Health and Safety Code section 11377 and Business and Professions Code section 4149. In April 1989, defendant was arrested by BART police and convicted of a Health and Safety Code section 11550 violation. In March 1990, San Francisco police arrested defendant for assault, resulting in a parole violation and reincarceration. After defendant was released in May 1991, in 1992, defendant was arrested twice in Oakland for violations of Penal Code sections 273.5, subdivision (a) and 211, but charges were not filed. In October 1993, defendant was arrested for a violation of Health and Safety Code section 11350, and convicted of violating Business and Professions Code section 4149, for which he received 12 months of summary probation and 30 days in jail. In 1994, defendant committed the rape resulting in his five strike priors conviction of 1996, receiving a sentence of 35 years; the sentence was recalculated to 17 years in 1999. Defendant was paroled in 2003. In March 2005, defendant was arrested on a parole violation, and was sentenced to eight months in prison, but after an appeal, the charge was dismissed. In August 2005, defendant's parole department found true that defendant had used cocaine, and parole was continued. In June 2006, defendant was arrested on a parole violation, and received eight months in jail. Defendant's parole was discharged on September 8, 2007.

Defendant's rape conviction in 1996 resulted from an incident in June 1994, when defendant raped and beat the victim Jennifer G. in Long Beach at his apartment. Jennifer G. met defendant in front of a thrift shop, where defendant was working on some bicycles. Defendant offered to buy her a beer, and they went to a liquor store. The victim followed defendant to his apartment; sometime during their walk to defendant's apartment, he hit her. The defendant and Jennifer G. sat on defendant's couch and smoked some crack. Defendant attacked her, licking her face, buttocks, and vagina, and

forced his penis into her vagina; he also forced her to orally copulate him. During the assault, defendant hit her numerous times, and hit her with a crate, tools and his fists. He yelled at her continually, and said, “I should kill you.” The victim escaped the next day. After the attack, Jennifer G. had two black eyes, abrasions, and cuts and bruises all over her body.

Defendant made a *Romero, supra*, 13 Cal.4th 497 motion, requesting the court to dismiss his five prior strike convictions. He argued that pursuant to *In re Saldana* (1997) 57 Cal.App.4th 620, even where a defendant has an extensive record, the minor and nonaggravating nature of the current offense was a powerful factor that supported dismissal of the strike priors. Defendant pointed out that as charged, he faced 10 years without the strike priors, and such a sentence would certainly serve justice in light of the nature of the current offenses and the fact he was 62 years old; in addition, the prior strikes were all based on the same incident and involved the same victim, and were out of character for him considering his other convictions for drug offenses and larceny. Since his parole in 2003, he was not found to be in violation, and after his discharge from parole in September 2007 until the current offense, he has not been charged with a crime.

At the sentencing hearing, the court stated: “[T]his will be Mr. Carter’s third strike. And there’s no question that the current offense is not a serious or violent felony and is . . . in terms of the severity of the offense, is on the lighter side. [¶] . . . [¶] . . . I recognize a sentence at this time in Mr. Carter’s life of 25 to life, and in this case I believe there would be four years of enhancements on top of that, is a significant sentence for anyone, and especially for someone who is in his sixties.” The court applied the factors of *People v. Williams* (1997) 17 Cal.4th 148, 161, finding that the nature of the current offense was the strongest factor in favor of defendant. However, with the respect to “[t]he nature and circumstances of the prior serious or violent felony, this is where the court has difficulty. The strikes we are talking about have to do with a 1994 arrest for rape, oral copulation, and other sexual-related offenses. It’s a total of five counts on which he was convicted, each of which is itself a strike. The 1994 arrest was over a two-

day period with a series of events that are very serious and troubling in nature concerning how they are committed. It's a very violent crime and caus[ed] enormous harm to the victim in that crime."

The court found defendant's case to be very similar to *Strong, supra*, 87 Cal.App.4th 328, a Third Appellate District case, and *Gaston, supra*, 74 Cal.App.4th 310, a Second Appellate District case, noting that defendant "has a criminal history dating back to the 1960's, including many violent crimes;" during the period 1965 to 1985, defendant had been convicted of 10 felonies and numerous misdemeanors; in 1987 and 1988 defendant had further drug convictions; in 1990 he violated his parole with an assault; in 1993 he suffered another drug conviction; the rape occurred in 1994, and defendant was paroled in 2003. After this parole, the court noted that "at most, three years passed between the time when [defendant] was released from custody in the strike cases and being picked up on this case." The court summarized, "[from] 1965 until the date of the strikes in this case, and then from this date until this charge, Mr. Carter has been . . . convicted of and sentenced to custody time for almost that entire period." The court recognized defendant had a substance abuse problem, but noted that in addition to the drug charges he had been convicted of significant violent felonies. "[T]he purpose of the Three-Strikes law is to ensure a longer sentence for people who are repeat offenders in this revolving door type of situation, and Mr. Carter is exactly in that situation. [¶] My concern is that if he were sentenced and the court were to strike the strikes—and I would note I'd have to strike a number of strikes to get it down even to being a second-strike case, and then he serves ten years. I have every reason to believe that from the day he's released, given his history, he will continue to commit crimes, whether they are theft-related, drug-related, or violent felonies, and that is the concern of the court."

The court stated that defendant's age and the fact he would be quite old by the time he was eligible for parole was in his favor, but "in terms of his character and background, everything in his record points to the fact that it's likely that he would reoffend from the

time he's released, and under that scenario it is difficult, but I think not supported by the evidence for the court to find that he's outside the spirit of the law."

Defendant testified to his criminal history and his upbringing. Defendant admitted that the first time he went to prison was in 1965 when he was 15 years old for stealing a car. He contends he did not try to escape, but "got into an altercation with a correctional officer, and they called it assault." He became addicted to heroin inside the penitentiary, and when he was released he was 17 years old. He asserted his other cases were related to drugs and possession of paraphernalia, and that his burglary charge was based on looting during a riot. Further, the 1994 rape was his only violent crime. Defendant detailed the difficulties of being a registered sex offender under Megan's law because the authorities listed the victim in his rape case as being under the age of 14; as a result defendant had a difficult time in prison and upon his release.

The court responded that nonetheless, given the nature of the original offense, the rape, and defendant's parole violations, it would not be appropriate for the court to strike any of defendant's strikes. "In light of the nature of [the 1994 rape], [defendant's] very lengthy criminal record, the fact that the crime is also tied to drug use, the court has every reason to believe that when Mr. Carter is released and he goes back to drug use another violent offense could occur. [¶] So for those reasons and the reasons I set forth earlier, the finding of the court is that the *Romero*[, *supra*, 13 Cal.4th 497] motion is denied."

B. Striking of Prior Strikes

The stated purpose of the Three Strikes law is to "ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (§ 667, subd. (b).) A trial court may exercise its discretion to strike a prior conviction in furtherance of justice. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 529–530; *People v. Williams, supra*, 17 Cal.4th at pp. 151–152.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and

circumstances of his present felonies and prior serious and/or violent felony convictions, the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams, supra*, 17 Cal.4th at p. 161.) Both the rights of the defendant and the interests of society must be considered when determining whether to strike a prior strike. (*Id.* at pp. 158–161.)

The court must consider all relevant factors. Focusing on a single factor, such as the nature of the current conviction, to the exclusion of other factors, is error. (*People v. Carmony* (2004) 33 Cal.4th 367, 379.) Factors relevant to the nature of the prior strikes include their remoteness in time (*Strong, supra*, 87 Cal.App.4th at pp. 338–340), whether the prior offenses involved violence or the use of a weapon (*People v. Myers* (1999) 69 Cal.App.4th 305, 308–310), whether multiple convictions arose out of the same act (*People v. Benson* (1998) 18 Cal.4th 24, 36, fn. 8), defendant's past criminal record (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1434), the increasing or decreasing severity of defendant's record (*Strong*, at p. 346), defendant's drug addiction and whether he or she has taken steps to ameliorate it (*Gaston, supra*, 74 Cal.App.4th at p. 322), whether the new offense is the same as prior offenses (*Strong, supra*, 87 Cal.App.4th at p. 344), and the nature and circumstances of the current offense, defendant's age, background, character, and prospects (*People v. Williams, supra*, 17 Cal.4th at p. 161; *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1251).

“‘The striking of a prior serious felony conviction is not a routine matter. It is an extraordinary exercise of discretion, and is very much like setting aside a judgment of conviction after trial.’ [Citation.]” (*People v. McGlothlin* (1998) 67 Cal.App.4th 468, 474.) It is a conclusion “that an exception to the [sentencing] scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.” (*Ibid.*)

We review the trial court's ruling for an abuse of discretion. (*People v. Garcia* (1999) 20 Cal.4th 490, 503; *Romero, supra*, 13 Cal.4th at p. 530.)

In *Gaston, supra*, 74 Cal.App.4th 310, the defendant had an extensive criminal career, including two crimes classified as serious felonies, as well as a dozen other felonies; he had been in prison on multiple separate occasions, in addition to his return to prison for violation of parole; and he had been in county jail during a good portion of the time between these confinements. Defendant's criminal history commenced in 1972 when he was convicted of grand theft; in 1974, he was convicted of grand theft auto and assault with a deadly weapon (two different incidents); in 1976, he was convicted of receiving stolen property; in 1977, convicted of three separate offenses (grand theft, grand theft auto, and driving under the influence); in 1978, convicted of grand theft; and in 1981, the defendant was convicted of the strike offenses, kidnapping and robbery. In 1990, defendant was paroled, and the same year was convicted of joyriding; in 1991, he was convicted of burglary, and in 1994, following release from prison, he was convicted of joyriding; in 1996, he suffered another conviction for joyriding, and in 1998, the present case, he was convicted again of joyriding. (*Id.* at p. 317.)

The defendant was on parole when he committed the crime at issue, a violation of Vehicle Code section 10851 (unlawful driving or taking of a vehicle). (*Gaston, supra*, 74 Cal.App.4th at p. 313.) The trial court granted the defendant's motion to strike one of his priors, an armed robbery occurring more than 10 years prior. The trial court relied on the nonserious nature of the present crime, recognizing it was a felony, the absence of the use of force in the present crime, and the defendant's attitude towards the offense. (*Id.* at p. 314.) In *Gaston*, Division Four of this District held the trial court abused its discretion in striking the strike, based on the defendant's "unrelenting record of recidivism, even while on parole or probation from previous felony convictions. As we observed from the outset, he is the kind of revolving-door career criminal for whom the Three Strikes Law was devised." (*Id.* at p. 320.) "The record indicates that [defendant] has received a number of breaks and has benefited from none of them. . . . What comes through most

prominently from a review of all of the circumstances is that he has committed an unending series of felonies, as well as other crimes, has been repeatedly punished for these crimes, including the service of four prior prison terms, and has failed to learn anything from the experience. [¶] Accordingly, [defendant] cannot reasonably be said to be outside the ‘spirit’ of the Three Strikes law, in whole or in part.” (*Id.* at p. 322.)

Similarly, in *Strong, supra*, 87 Cal.App.4th 328, upon which the trial court relied, the defendant had a 22-year criminal record, including six felonies within the previous eight years and 12 misdemeanors. The defendant’s strike offense consisted of an unprovoked assault with a knife on a bystander occurring three years before the current offense, which was the sale of a substance falsely represented to be cocaine in violation of Health and Safety Code section 11355. (*Strong*, at p. 331.) The trial court struck the strike finding it was “‘out of character’” with his prior offenses, and thus a sentence under the Three Strikes law was inconsistent with that law’s spirit. (*Id.* at p. 334.)

Reversing the trial court, the Third Appellate District found the Three Strikes law did “not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court ‘conclud[es] that an exception to the scheme should be made’ As our Supreme Court concluded, ‘[p]lainly the Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.’” (*Strong, supra*, 87 Cal.App.4th at pp. 337–338.) Applying this rationale, the Court of Appeal found the trial court abused its discretion because the defendant’s three-year-old strike offense, for which he was currently on parole when the charged offense was committed, and all five of defendant’s felonies had occurred in the previous eight years, meant that he was the kind of “‘revolving door’” criminal for whom the Three Strikes law was designed. (*Id.* at p. 340.)

On the other hand, in *People v. Saldana, supra*, 57 Cal.App.4th 620, a Second Appellate District case, on which defendant relies, the defendant was convicted in 1994

of one count of possession of a controlled substance, heroin, in violation of Health and Safety Code section 11350. The trial court granted the defendant's habeas petition striking prior strikes for a 1977 residential burglary conviction and a 1981 robbery conviction on the basis that the current offense was relatively minor, the burglary conviction was 16 years old, the defendant was married with two children, and was older and less likely to commit crimes. (*Id.* at pp. 623–624.) *Saldana* found that based upon the “entire picture” of defendant, the trial court did not abuse its discretion in striking the prior strike. (*Id.* at pp. 626–627.)

Here, we do not find the trial court abused its discretion in refusing to strike defendant's prior strikes. The trial court considered all factors relevant to the exercise of its discretion, including those factors weighing in defendant's favor (his age, the nonviolent nature of the current crime), and those factors weighing against defendant (his lengthy and continuous criminal record consisting of a pattern of drug and property crimes extending over a 40-year period, and the seriousness of the strike offenses themselves). Putting all these factors together, as the trial court did here, and finding nothing in defendant's history, character or circumstances took him outside of the spirit of the Three Strikes law, the defendant is more like the defendants in *Gaston*, *supra*, 74 Cal.App.4th 310 and *Strong*, *supra*, 87 Cal.App.4th 328 who were career criminals with lengthy histories and repeated episodes of crimes. In that respect, defendant is unlike the defendant in *People v. Saldana*, *supra*, 57 Cal.App.4th 620, whose serious felonies were remote in time, who did not have a lengthy record indicating he was a career criminal, and who had a stable home life.

C. Cruel and Unusual Punishment

Defendant argues that his sentence of 25 years to life is grossly disproportionate to the crime committed, and it offends fundamental notions of human dignity to sentence a senior citizen to prison for the rest of his life for the sale of 10 pills prescribed to him. Although defendant did not raise this issue in the trial court, we consider it to forestall a

claim of ineffective assistance of counsel. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

The Eighth Amendment to the federal Constitution proscribes “cruel and unusual punishments [and] contains a ‘narrow proportionality principle’ that ‘applies to noncapital sentences.’” (*Ewing v. California* (2003) 538 U.S. 11, 20 [123 S.Ct. 1179, 155 L.Ed.2d 108].) A proportionality analysis requires consideration of three objective criteria, which include ““(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.’ [Citation.]” (*Id.* at p. 22, quoting *Solem v. Helm* (1983) 463 U.S. 277, 292 [103 S.Ct. 3001, 77 L.Ed.2d 637].) “[F]ederal courts should be reluctant to review legislatively mandated terms of imprisonment, and . . . successful challenges to the proportionality of particular sentences should be exceedingly rare.” (*Ibid.* at p. 22; see also *Lockyer v. Andrade* (2003) 538 U.S. 63, 77 [123 S.Ct. 1166, 155 L.Ed.2d 144] “[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case”].)

The standard under the California Constitution to determine whether a sentence is cruel or unusual is similar to the test under the Eighth Amendment of the federal Constitution: a punishment may be cruel or unusual if it is “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424.) We look at the nature of the offense and the offender as well as compare the punishments imposed within California for more serious offenses and in other jurisdictions for similar offenses. (*Id.* at pp. 425–428; see also *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.) With respect to the nature of the offense and nature of the offender, courts may consider the facts of the crime in question including the motive, the manner, the defendant’s involvement and the consequences, as well as the facts of the offender, including his culpability, prior criminality and state of mind. (*People v. Dillon* (1983) 34 Cal.3d 441, 479.)

The purpose of recidivist statutes is “to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person’s most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.” (*Rummel v. Estelle* (1980) 445 U.S. 263, 284 [100 S.Ct. 1133, 63 L.Ed.2d 382].) Under the federal Constitution, sentencing a three-time offender to a life sentence was not cruel and unusual punishment where the crimes included fraudulent use of a credit card, passing a forged check, and felony theft, which together totaled less than \$300. (*Rummel*, at pp. 265–266.) Under the California Three Strikes law (§ 667, subds. (b)–(i)), it was not cruel and unusual punishment to sentence a recidivist criminal to 25 years to life where the triggering offense was the theft of three golf clubs. (*Ewing v. California*, *supra*, 538 U.S. at pp. 30–31.) A term of 40 years for possession with intent to distribute and distribution of marijuana was not cruel and unusual punishment. (*Hutto v. Davis* (1982) 454 U.S. 370 [102 S.Ct. 703, 70 L.Ed.2d 556].) Under the California Constitution, the imposition of a 61-years-to-life term for an offender convicted of two counts of residential burglary with two prior convictions for the same offense was not cruel or unusual. (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1415–1416, disapproved on another ground in *People v. Dotson* (1997) 16 Cal.4th 547, 559, 560, fn. 8.) A sentence of 25 years to life for an ex-felon in possession of a handgun who had two prior robbery convictions was not cruel or unusual punishment. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 828.)

Here, defendant’s criminal history dates back to 1965 and has been continuous, primarily consisting of drug offenses and property crimes. At 62 years of age, defendant has shown no signs of slowing down his criminal behavior, and indeed the instant crime is one of the type of crimes defendant has committed numerous times over the course of his lifetime. “Fundamental notions of human dignity are not offended by the prospect of exiling from society those individuals who have proved themselves to be threats to the

public safety and security. Defendant's sentence is not shocking or inhumane in light of the nature of the offense and offender." (*People v. Ingram, supra*, 40 Cal.App.4th at pp. 1415–1416.)

II. ELEVATION OF SECOND STRIKE CASE TO 25 YEARS TO LIFE

Defendant contends his due process rights were violated when his case, a presumptive second strike case, went to trial as at 25-years-to-life case without notice to him after he elected to go to trial. He contends he had no notice that if he rejected a pretrial offer, his only option would be to face a 25-years-to-life term. He requests that we reverse his sentence and that on remand, it must be reduced to no more than the maximum he would have received as a second strike offender. Respondent contends defendant forfeited the issue for failing to raise it in the trial court, and in any event had notice his case would proceed as a third strike matter based on the information and amended information, which both alleged prior strikes; the second strike case policy was only a presumption; and the court at the various hearings early on stated the case was potentially a third strike case.

A. Factual Background

At the preliminary hearing held December 29, 2009, the trial court set bail at \$170,000, informing defendant that "this potentially is a third strike case." The court further advised defendant that, "this county's district attorney normally does not proceed as a third strike case in these type[s] of cases. But for purposes of bail, nonetheless those rules are followed."

At arraignment held January 12, 2010, defendant contends the prosecution offered eight years with an admission of one of defendant's strike priors. Defendant declined the offer with the belief that he could have all his strikes set aside given his age and the nature of the current offense.⁵

⁵ Defendant's version of these nonrecorded events is set forth in his motion to strike his prior strikes filed February 17, 2011.

During the period March 16, 2010 through June 23, 2010, at five pretrial hearings, according to defendant, the prosecution did not mention treating the case as a third strike case. According to his counsel, at some point during this pretrial period, the prosecution offered defendant a plea to the low term on count two, doubled to four years at 80 percent with an admission of a strike prior. Defendant again rejected the offer and the matter was set for trial. Defendant counter offered five years at 50 percent.

On June 23, 2010, defendant announced he was ready for trial. The matter trailed to June 29, 2010, and the offers remained the same. According to defendant, the prosecution did not inform him that it would proceed under the Three Strikes law and seek a 25-years-to-life sentence. At the hearing, defendant informed the court his last offer had been four years with a strike. Judge Klein turned to the prosecution and said, “I assume this is a presumptive non-Three Strikes matter,” to which the prosecution responded, “Yes.” The court noted that according to its calculations, defendant faced a term of 16 years.⁶ The prosecution informed the court it was not inclined to strike the strike. The court noted that the offer was four years, and turned to defendant and asked, “Do you want to go to trial and risk a judge giving you a very long sentence? I don’t know what they’re going to do. You know the math. Or do you want to take this four-year offer? I saw what the strike is. That’s a very serious crime. It doesn’t go away.” Defendant stated he wanted to go to trial. The court turned to trial setting and reiterated, “We’re doing a presumptive non-third strike,” and stated, “Max is, what, 16 years?” The prosecution reiterated that its offer was four years with the strike and defendant countered with five years and no strike.

The court informed defendant that the time he would be serving under either offer was not that much different: If he served four years with the strike that would entail, at

⁶ The minute order for June 29, 2009 indicates that defendant’s maximum exposure was 16 years, and that defendant had rejected the prosecution’s offer of four years with a strike.

85 percent, a three and half-year sentence. On other hand, he was facing a maximum sentence of 16 years.

On July 1, 2010, the matter was sent to master calendar court for assignment to a trial court. At that time, moments before trial, defendant was informed that the prosecution would seek 25 years to life. Defendant requested more time to prepare his case. The court continued the matter to August 4, 2010, and sent it back before Judge Klein.

On August 4, 2010, defense counsel objected that he had not been informed until minutes before trial that the prosecution was proceeding as a three strikes case and seeking 25 years to life based on the “heinousness” of the rape case. The court advised defendant that it recalled defendant’s offer was without strikes and that the court advised him, “I wasn’t going to do it at that time. But when I send a case to [Department] 100, that’s it. I don’t want a situation where the defendant thinks maybe he can—I don’t know if this is what happened or not—that maybe he can get sent to another court and get a better deal, and if not, he comes back here and accepts the same deal. If that’s what he was thinking, that’s not how I operate the courtroom.”

Defense counsel advised the court that was not his tactic, and stated, “We’re here because the people are proceeding on a life case for sales of Vicodin, which is not the typical policy. So we’re in a totally different position than we were as far as the amount of time and exposure that [defendant] is facing than we were before we left. [¶] . . . [¶] So we’re not here to just negotiate. We’re asking the court to reconsider the case, given the new circumstances.”

The court stated, “But at this point, when I send it to [Department] 100, I’m not going to engage in, ‘well, I’ll strike this and see if he is going to plead.’ I’m not going to do that. [¶] So it would have to be an open plea. And I’ve been here long enough. I think both sides know my sentencing practices. I also think—I’m not sure that—if you want to plead open, I think [Department] 100 would let you choose your court. I’m not sure. . . . [¶] So if Mr. Carter wants to do that, fine. But what I know about this case,

I'm just saying, I will not engage in negotiations on any *Romero*[, *supra*, 13 Cal.4th 497] motions at this point."

Defendant requested and was granted additional time to prepare.

On January 20, 2011, the matter proceeded to trial. The court stated that it had spoken to counsel in chambers and the last offer from the prosecution was 25 years to life, and that because the parties were "quite far apart," the matter would proceed to trial. Defendant's counsel advised the court that, "I spoke with my client just in custody a few moments ago. He indicated to me he has absolutely no desire to go forward with the jury trial. He wants to plead on this matter. I explained to him that at this point there is no offer to actually plead to, but I did want to express his desire to the court and let the court know that he has no desire to go forward with the jury trial." The court stated, "So I guess the real question is—well, there are two things. First of all, a defendant always has the right to enter a plea to what is charged in the information. That's something you can always do. The question is whether you would get an indicated sentence from the court in advance or whether the district attorney is prepared to make an offer in advance." The prosecution reiterated that the last offer was 25 years to life.

Defendant maintained in his motion to strike his strike priors that the prosecution's decision to proceed as a Three Strikes case was contrary to the district attorney's own "Three Strikes Policy," which provided that if a defendant had two or more qualifying prior felony convictions, the case was presumed to be a second strike case if none of the charged offenses was a serious or violent felony. Such presumption could be rebutted if the current case involved the use of a firearm or deadly weapon, injury to a victim, or a threat of violence. Defendant asserted that the prosecution's decision to proceed at trial as a third strike case was vindictive.

At the sentencing, the prosecution clarified why it was proceeding with a third-strike case stating, "with regard to our office policy which was cited in the [defendant's] papers, you know, I'll just point out that I believe that that's, frankly, neither here nor there for the purposes of this sentencing and that, you know, our internal procedures have

been followed in this case to the extent that that's relevant for a court, you know, looking at this later. [¶] My understanding, in a nutshell, is that once the case was reviewed by our head deputy, who's the person who makes offers, and of the nature of the priors in the case, became aware through the acquisition of the D.A. file which had numerous materials, that at that time we felt that the case was a life case and that's why we proceeded the way we did. So just so that is on the record and that is out there."

B. Discussion

"[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 364 [98 S.Ct. 663, 54 L.Ed.2d 604] (*Bordenkircher*).) As explained in *Wayte v. United States* (1985) 470 U.S. 598, 607–608 [105 S.Ct. 1524, 84 L.Ed.2d 547], "[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute."

Although prosecutorial discretion is broad, it is not unfettered. Indeed, "[s]electivity in the enforcement of criminal laws is . . . subject to constitutional constraints." (*United States v. Batchelder* (1979) 442 U.S. 114, 124–125 [99 S.Ct. 2198, 60 L.Ed.2d 755].) The decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the

exercise of protected statutory and constitutional rights. (*Wayte v. United States, supra*, 470 U.S. at p. 608.)

A denial of due process in the form of a vindictive or retaliatory prosecution occurs when a charging decision is motivated by a desire to punish the defendant for doing something the law allows him to do. (*United States v. Goodwin* (1982) 457 U.S. 368, 372 [102 S.Ct. 2485, 73 L.Ed.2d 74] (*Goodwin*); *People v. Bracey* (1994) 21 Cal.App.4th 1532, 1549.) As motives are difficult to prove, the United States Supreme Court found it necessary to presume a vindictive motive in certain cases where action adverse to the defendant has been taken after the defendant exercised a legal right. (*Goodwin*, at p. 373.) The presumption applies, however, only where a reasonable likelihood of vindictiveness exists, since applying the presumption may thwart a legitimate response to criminal conduct. (*Id.* at pp. 373, 384.) “[A] mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule.” (*Ibid.*) Before trial commences, i.e., before jeopardy attaches, no presumption of vindictiveness applies, even where there is some appearance of vindictiveness. (*Goodwin*, at p. 384; *People v. Michaels* (2002) 28 Cal.4th 486, 515; *People v. Edwards* (1991) 54 Cal.3d 787, 828 [jeopardy is an important factor in determining vindictiveness].) Before trial, the defendant must show with objective evidence that the state’s charging decision was based upon improper considerations. (*Bracey*, at p. 1549.)

“If the defendant demonstrates facts sufficient to give rise to a presumption of vindictiveness, the burden shifts to the People to rebut the presumption.” (*People v. Johnson* (1991) 233 Cal.App.3d 425, 447.) The prosecution must then demonstrate an objective change of circumstance justifying the charging or sentencing decision and must show the new information could not have reasonably been discovered when the prosecutor filed the original charges. (*People v. Bracey, supra*, 21 Cal.App.4th at p. 1545.)

In *Twiggs v. Superior Court* (1983) 34 Cal.3d 360 (*Twiggs*), after the jury was unable to reach a verdict, the prosecution offered the defendant a plea agreement. (*Id.* at

p. 364.) After the defendant rejected the offer and exercised his right to a jury trial, the prosecutor was permitted to amend the information to charge five additional prior felony convictions as enhancements. (*Id.* at pp. 364–365.) The *Twiggs* court reasoned that “[t]he same considerations that led the high court to condemn such prosecutorial conduct in the context of a postconviction appeal are applicable when the defendant asserts his right to a retrial after a mistrial. As a prosecutor would have a considerable stake in discouraging appeals requiring trials de novo, so too would the prosecution in a case such as this have a great interest in discouraging defendant’s assertion of a retrial, particularly since the prosecution was unable to obtain a conviction in the first trial.” (*Id.* at p. 369.) The court stated that “[w]here the defendant shows that the prosecution has increased the charges in apparent response to the defendant’s exercise of a procedural right, the defendant has made an initial showing of an appearance of vindictiveness.” (*Id.* at p. 371.)

Twiggs, supra, 34 Cal.3d 360 distinguished *Bordenkircher, supra*, 434 U.S. 357 in which the prosecutor told the defendant during plea negotiations that, if he did not plead guilty and accept the five-year offer, the prosecution would seek an indictment under the state’s recidivist statute and thus expose the defendant to a maximum sentence of life imprisonment. (*Bordenkircher*, at pp. 358–359.) In *Bordenkircher*, the United States Supreme Court held that the prosecutor’s conduct did not violate the defendant’s right to due process by openly presenting him with the disagreeable choice of accepting the plea or facing charges on which he was clearly subject to prosecution. (*Id.* at p. 365.) *Twiggs* stated that *Bordenkircher* “specifically did not decide the issue of vindictiveness presented in a case such as this, where the record suggests that the more serious charges were not part of the ‘give-and-take’ of plea negotiations. Rather, in this case, the circumstances strongly suggest that the prosecutor unilaterally imposed a penalty in response to the defendant’s insistence on facing a jury retrial.” (*Twiggs*, at p. 371.) The *Twiggs* court found a presumption of vindictiveness, and found its reasoning consistent with the general rule of the Ninth Circuit Court of Appeals that “[w]here the defendant shows that the prosecution has increased the charges in apparent response to the

defendant's exercise of a procedural right, the defendant has made an initial showing of an appearance of vindictiveness. [Citation.]" (*Ibid.*) *Twiggs* applied this rule to the case before it because "[t]he prosecution showed no interest in charging the additional prior convictions until the defendant insisted on a retrial, circumstances that plainly gave rise to a presumption of vindictiveness." (*Id.* at p. 372.)

Here, unlike *Twiggs, supra*, 34 Cal.3d 360, where the prosecution amended the information to add five additional prior felony convictions as enhancements after the defendant rejected a plea deal and exercised his right to a jury trial, defendant's five strike priors were charged in the information. Thus, defendant cannot establish a presumption of vindictiveness because the matter was always a Three Strikes case. The prosecution's expressed policy of charging cases like defendant's as a two-strikes case does not raise a presumption of vindictiveness because that a presumption arises only where there is objective evidence the state's charging decision is based upon improper motives. (*People v. Bracey, supra*, 21 Cal.App.4th at p. 1549.) No such evidence exists here; defendant's case was always a Three Strikes case and the prosecution's decision to proceed as a Three Strikes case was not based upon defendant's exercise of his right to a jury trial, but due to the "heinous" nature of the offense out of which the strikes arose. Thus, defendant's case did not change in character such that he had no notice of the potential outcome of proceeding to trial as opposed to accepting the prosecution's plea offer. Rather, defendant chose to proceed to trial on a potential Three Strikes matter because he did not want to accept the plea deal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.